obtain during periods of short supply. However, under Sections 1(10), 1(13) and 1(14)(a) of the Interstate Commerce Act, 49 U.S.C. 1(10), 1(13) and 1(14)(a), the Commission's concern must be with the supply of cars as well as their distribution. Appellees fail to recognize that in the orders under attack the Commission was addressing itself primarily to the problems of supply.

Similarly, the appellee steel companies mistake the Commission's position; contrary to their assertion (Motion to Affirm of Allegheny-Ludlum Steel Corporation, *et al.*, p. 8), the Commission specifically acknowledged that Car Service Rules 1 and 2 "are not designed to improve the utilization of freight cars * * *" (J.S. App. 65). And, again, contrary to their assertion (Motion to Affirm of Allegheny-Ludlum Steel Corporation, *et al.*, p. 8), the Commission did find that the "continuing relocation of cars on owner's lines," which the mandatory observance of these Car Service Rules would accomplish, "is of major importance to the maintenance of an adequate car supply" (J.S. App. 63), and explained the reasons for this finding (J.S. App. 65–66).

This failure to distinguish between the problems of car supply and car distribution is also reflected in the appellees' emphatic reliance on *Palmer* v. *United States*, 75 F. Supp. 63, 68 (D. D.C.), a case in which the court found that the Commission's order was not suited to promoting the efficient distribution of rail-

road freight cars, as had been the stated purpose of the order there at issue.[1]

2. Appellees' effort to deny the existence of a conflict between the decision below and the decision in *Florida East Coast Railway Company* v. *United States*, 327 F. Supp. 1076 (M.D. Fla.) (J.S. App. 184–203), does not withstand analysis. The *Florida* court's disagreement with the decision of the court below was substantive and complete (J.S. App. 200). To say that the decisions of the *Florida* court and of the court below are reconcilable because the former focused upon the substantiality of the evidence supporting the findings of the Commission, whereas the latter examined only the sufficiency of those findings, is in reality to acknowledge that the findings that the court below would require the Commission to make as a matter of law would not have been supported by the record in either case. In effect, the court below held that, as a matter of law, the prescription of mandatory Car Service Rules 1 and 2 can be sustained only upon a finding that the car shortages predominated on the lines of the owning railroads and upon a further finding that the non-owning railroads are financially able to augment their fleets; the *Florida* court held that these findings are unnecessary.

We submit that the *Florida* court's decision is correct; neither finding is required to support the Com-

[1] The *Palmer* decision was overruled by subsequent congressional enactment. 80 Stat. 168. See S. Rep. 386, 89th Cong., 1st Sess. 6–7 (1965); H. Rep. 1183, 89th Cong., 1st Sess. 6 (1965).

mission's action. Basic to the Commission's action was its belief, for which there is support in the record, that the incentive for procuring cars is dampened to the extent that a railroad is denied the use of its equipment during periods of short supply (J.S. App. 55). Similarly, the Commission believed that making it more difficult for the car-deficient railroads to use the cars of other roads during such periods will encourage them to add to their equipment, even at the risk of foregoing other and perhaps otherwise more attractive investment opportunities (*ibid.*).

3. Appellees assail the reasonableness of the Commission's prescription of Car Service Rules 1 and 2 for mandatory observance by referring to the testimony of witnesses before the Commission to the effect that more than 80 percent compliance could not be expected. They do not advise the Court, however, that this testimony was offered without taking into consideration the exceptions to the Rules that can be obtained under Note B to Car Service Rules 1 and 2 (J.S. App. 157–158) and by Rule 19 (J.S. App. 172). There is nothing of record to suggest that substantial compliance with the Rules, conditioned to permit exceptions, is not feasible.

4. Finally, appellees argue (Motion to Affirm of Association of American Railroads, p. 16; Motion to Affirm of Allegheny-Ludlum Steel Corporation, *et al.*, p. 13) that the Commission's report and orders "do not apply to 'all the nation's railroads.' " But the report and orders by their terms apply to all Class I railroads,

which are those with annual operating revenues of $5,000,000 or more. 49 C.F.R. 1240.1.

For the reasons stated herein and in our Jurisdictional Statement, and in order to resolve the conflict between the court below and the *Florida* court, the motions to affirm should be denied and probable jurisdiction should be noted.

Respectfully submitted.

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